Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

WILLIAM P. ROGERS, *Attorney General*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia sustaining an order for the deportation of petitioner.

OPINION BELOW

The opinion of the court below (R. 54-61) has not yet been officially reported. Copies of the opinion and judgment are appended hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals were issued on December 8, 1960 (R. 54, 62). A timely petition for rehearing was denied on January 9, 1961 (R. 70, 71). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether under the doctrine of *Rowoldt* v. *Perfetto,* 355 U.S. 115, an alien may be deported for past membership in the Communist Party on the basis of evidence of attendance at Party meetings and payment of dues, and without evidence that the membership was a "meaningful association."

2. Whether the Immigration and Naturalization Service has the burden of proving that the membership was a meaningful association and hence cause for deportation, or whether the alien has the burden of proving that it was not.

3. Whether deportation of lawfully admitted resident aliens must, as in denaturalization and expatriation cases, be supported by "clear, unequivocal and convincing" evidence.

4. Whether the statute providing for the deportation of resident aliens for past membership in the Communist Party is unconstitutional on its face or as here applied.

STATUTES INVOLVED

Section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U.S. Code, sec. 1251(a)(6)(C), provides in part:

(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

* * * * * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."

Section 242(b)(4) of the Immigration and Nationality Act, 8 U.S. Code, sec. 1252(b)(4), provides in part:

"No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

STATEMENT OF THE CASE

Petitioner, a Mexican national, entered the United States for permanent residence in 1920 at the age of 10. He has resided in the United States continuously since that date. He is married and has two children and five grandchildren, all born in the United States. (R. 4.) He was ordered deported on a finding that he had been a member of the Communist Party in 1949 and 1950, and hence was deportable under sec. 241(a)(6)(C) of the Immigration and Nationality Act, 8 U.S. Code, sec. 1251(a)(6)(C) (R. 30).

Two witnesses testified in support of the charge of past Communist Party membership. Daniel Scarletto[1]

[1] In another proceeding, the Subversive Activities Control Board considered certain testimony of Scarletto "questionable" and refused to credit it. See Modified Report of the Board in *Brownell v. Communist Party of the United States*, Docket No. 51-101, p. 123, ftn. 1, appearing at p. 2549, ftn. 84, of the printed record in *Communist Party v. Subversive Activities Control Board*, No. 12, Oct. Term, 1960.

testified that he had seen petitioner at about fifteen Party meetings in 1949-1950, some of which may not have been closed meetings, and had collected dues from the petitioner (R. 46-50). Fabian Elorriaga also testified that he had seen petitioner at Party meetings. At one point he testified that he had seen petitioner at three or four meetings a month over the three year period of 1949-1951. At another he testified that he only recalled petitioner's attending two or three meetings in toto (R. 33, 45-46). The Board of Immigration Appeals did not resolve this conflict in Elorriaga's testimony, stating that the inconsistency was immaterial since under either version petitioner was a "member of the Communist Party" (R. 32-33).

This was the sole evidence on the subject of membership. The government introduced no evidence on the nature of petitioner's membership, or that he had ever engaged in any Party activity, or that he had ever said anything at Party meetings.[2] Petitioner refused to testify, relying on his privilege against self-incrimination (R. 30). The findings upon which the order of deportation was based were set forth by the Board of Immigration Appeals as follows (R. 35):

> "Membership in the Communist Party was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the respondent and had attended closed meetings of the Communist Party with him and the general corrob-

[2] The Board of Immigration Appeals noted that Scarletto, the witness upon whom the Board principally relied, "observed the [petitioner] over a reasonable period of time" (R. 30). Still, Scarletto did not testify to any activity on the part of petitioner.

oration offered by the testimony of government witness Elorriaga.'"[3]

On this basis the Board of Immigration Appeals held on November 14, 1957, that petitioner was deportable under section 241(a)(6)(C) of the Immigration and Nationality Act. Thereafter, petitioner moved the Board for reconsideration in the light of *Rowoldt* v. *Perfetto*, 355 U.S. 115, decided on December 9, 1957. On May 12, 1958, the Board granted this request and ordered the deportation hearing reopened, stating in part as follows:

> "Neither by testimony at the hearing nor as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political party . . . . Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a political party and long association with it" (R. 36).
>
> "Normally, reopening would be denied. However, we shall reopen proceedings because we believe it to be in the best interest of both the government and alien. If judicial review is sought in this case and the court declares that we are wrong in our evaluation of *Rowoldt*, the Service, if it has evidence bearing on the nature of the respondent's membership, will be required to bring new proceedings, and the respondent will be faced with the

[3] The Court of Appeals in its opinion quoted the Board's earlier recital of testimony introduced by the government, adding the comment, "We think the record amply supports this finding" (R. 56). However, this recital did not constitute a finding of the facts by the Board, which did not credit or accept all of the government's testimony.

> prospect of defending himself before the administrative authorities and perhaps again seeking judicial review. . . . *There was little development of the respondent's awareness of the fact that he belonged to a political organization.*" (R. 37, emphasis supplied.)

At the reopened hearing no additional evidence was introduced by either side (R. 44). The Special Inquiry Officer again held appellant deportable relying upon a previous decision of the Board of Immigration Appeals holding "that a claim to exemption from deportability under the *Rowoldt* decision is rejected when [the alien] refused to testify and the uncontradicted testimony of the witnesses showed that [the alien] was a member of the Communist Party over a period of years, attended meetings regularly, and paid dues. In the circumstances, the normal inference follows that he was aware that the party he had joined operated as a political organization" (R. 41-42). On appeal the Board of Immigration Appeals affirmed, stating (R. 44):

> "The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning."

Petitioner sued in the United States District Court for the District of Columbia to review and enjoin the deportation order (R. 1-3). Cross-motions for summary judgment were filed, both supported by the record of the deportation proceedings (R. 3-5). The District Court granted summary judgment for the Attorney General (R. 53). The Court of Appeals, with only two members of a panel sitting,[4] affirmed (R. 54-61).

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[4] Judge Edgerton, who had been designated as a member of the panel, was ill at the time of argument and took no part in the consideration or decision of the case (R. 54).

The theory of the affirmance was that once the Immigration Service shows bare organizational membership in the Communist Party, the burden is then on the alien to demonstrate that the membership was not the "meaningful association" required by *Rowoldt* v. *Perfetto, supra*, in order to be a cause for deportation (R. 60-61). A timely petition for rehearing was denied (R. 70, 71).

REASONS FOR GRANTING THE WRIT

1. This case involves an important problem as to the locus of the burden of proof in deportation cases.

Rowoldt v. *Perfetto*, 355 U.S. 115, held that the statutory provision for deporting members of the Communist Party applied only to membership which had a certain political significance, described as a "meaningful association." In the present case, the evidence on membership (attendance at some Party meetings and payment of dues) obviously did not measure up to that which was held insufficient to support deportability in *Rowoldt*.[5] Indeed, the Board of Immigration Appeals overstated the situation when it observed (R. 37): "There was little development of [petitioner's] awareness of the fact that he belonged to a political organization."

The Court of Appeals sustained the deportation order, however, by holding that once the Immigration and Naturalization Service has established bare organizational membership, the burden is then on the alien

[5] In *Rowoldt*, the alien had belonged to the Communist Party about a year, had attended meetings and paid dues, had run a Party bookstore (355 U.S. at 116-118), and had "considerable, albeit rudimentary, knowledge of Communist history and philosophy" (*id.* at 125, dissenting opinion).

to prove, if he can, that the membership was not a "meaningful association" and hence not a cause for deportation under *Rowoldt*.

The holding below is novel, not only in its application of the *Rowoldt* doctrine, but in deportation law generally.[6] The decision below marks the first time that any court has ever held that the Immigration and Naturalization Service does not have the burden of proving that the alien is within the deportable class defined by statute. That the burden of proof of deportability rests upon the Service has heretofore been unquestioned. See *Kimm* v. *Rosenberg*, 363 U.S. 405, 412-413; "It has not been, and scarcely could be, controverted that the Government must in general bear the burden of demonstrating, in administrative proceedings, the deportability of an alien: whatever the exceptions to the rule may be,[7] it was established by the time relevant here that where post-entry misconduct is charged as the basis for deportability, the burden is

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[6] The opinion found "inferential support" for its position in a sentence in *Galvan* v. *Press*, 347 U.S. 522 (R. 60). We think the inference is plainly not justified. Otherwise the opinion relied on an analysis derived from a general "study of the development of the present law" (R. 58). The crux of the study, however, is the egregiously mistaken view that the statutory provisions involved in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, turned on the alien's personal advocacy rather than his organizational membership.

[7] Justice Brennan added the following footnote: "Section 23 of the 1924 Immigration Act, 43 Stat. 165, placed the burden on the alien in a deportation proceeding to show that he had been lawfully admitted to the country. The current Act is to the same effect. Section 291, 66 Stat. 234, 8 U.S.C. section 1361. The courts . . . . drew a sharp distinction between this issue and the matter of deportability owing to post-admission conduct. The failure of Congress to specify other issues on which the alien has the burden is confirmation of the correctness of these decisions."

the Government's." [Brennan, J., dissenting]. See also *Chew* v. *Rogers*, 257 F. 2d 606; *Zito* v. *Moutal*, 174 F. Supp. 531, 538.

This unprecedented rule shifting the burden of proof to the alien has been developed in a case where the charge was past membership in the Communist Party. If permitted to stand, it may well expand into other areas. This case, therefore, presents novel questions which are important to the administration of the deportation statutes and to the rights of aliens.

2. The holding below placing the burden of proof on the alien is contrary to this Court's decision in *Rowoldt*. The following passages from the Court's opinion in *Rowoldt* clearly indicate that there the Court placed on the Service the burden of proving that the membership was meaningful association and not merely bare organizational membership:

> "There must be a *substantial basis for finding* that an alien committed himself to the Communist Party in consciousness that he was 'joining an orzation known as the Communist Party which operates as a distinct and active political organization . . .'" (355 U.S. at 120)
>
> "Bearing in mind the *solidity of proof that is required* for a judgment entailing the consequences of deportation, . . . we cannot say that the unchallenged account given by petitioner of his relations to the Communist Party establishes the kind of meaningful association required. . . ." (*Ibid.*) (Emphasis supplied.)

Despite this, the court below sustained the deportation order in the absence of any "substantial basis for finding" or of any "solidity of proof." On the contrary, the fact-finding agency in stating that: "There

was little development of the respondent's awareness of the fact that he belonged to a political organization," in effect expressly found that there was neither a "substantial basis" nor a "solidity of proof" to justify the finding of deportability.

3. The Board of Immigration Appeals, and possibly the court below as well, justified placing the burden on the alien on the theory that an "inference" of meaningful association "normally follows from the joining and association with a political party" (R. 37). This failed to take into account the fact that the Service's witnesses, though purportedly well acquainted with petitioner, gave no testimony as to anything he actually did or said in the Communist Party other than attending a few meetings and paying dues.

Resort to this flimsy inference is contrary to section 242(b)(4) of the Immigration and Nationality Act, 8 U.S. Code 1252(b)(4), which provides: "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." By using the inference, the Board also violated the "substantial evidence" requirement of section 10 of the Administrative Procedure Act, 5 U.S. Code 1009. That provision, which applies to deportation orders (*Shaughnessy* v. *Pedreiro*, 349 U.S. 48), requires that the evidence "must do more than create a suspicion of the existence of the fact to be established." *National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U.S. 292, 300. Nor is the "substantial evidence" requirement satisfied by evidence which, like here, "gives equal support to inconsistent inferences." *Appalachian Elec. Power Co.* v. *National Labor Relations Board*, 93 F. 2d 985, 989.

The findings of the Board did no more "than create a suspicion of the existence of the fact to be established," i.e., the meaningful association which is a requisite for deportation. Significantly, in *Rowoldt* this Court did not set aside the deportation order on a finding that Rowoldt's membership *was* without political significance, but rather on a finding that "the dominating impulse to his 'affiliation' with the Communist Party *may well have been* wholly devoid of any 'political' implications" (at 121, emphasis supplied). On the findings here made, petitioner's affiliation also "*may well have been* wholly devoid of any political implications," and indeed the Board of Immigration Appeals so recognized. The decision of the court below upholding the deportation order despite the acknowledged absence of evidence to support it, is in conflict with the statutory requirements for administrative orders and the precedents of this Court.

4. The decision below is inconsistent with the decisions in other Circuits applying *Rowoldt*. These have not placed the burden of proof on the alien, but have instead determined whether meaningful association was or was not established by the totality of the evidence in the record. *Niukkanen* v. *McAlexander*, 265 F. 2d 825 (9th Cir.), aff'd, 362 U.S. 390; *Diaz* v. *Barber*, 261 F. 2d 300 (9th Cir.);[8] *McKay* v. *McAlexander*, 268 F. 2d 35 (9th Cir.); *Schleich* v. *Butterfield*, 252 F. 2d 191 (6th Cir.), cert. den. 358 U.S. 814; *Williams* v. *Mulcahey*, 253 F. 2d 709 (6th Cir.), cert. den. 356 U.S. 946; *Wellman* v. *Butterfield*, 253 F. 2d 932 (6th Cir.).

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[8] In *Diaz* the court invalidated a deportation order on the ground that "like *Rowoldt* . . . . Diaz is a small rabbit in the Communist hutch" (at 301).

As the Ninth Circuit stated in *Niukkanen* (265 F. 2d at 828):

> "The precedent value of Rowoldt, then is not to be derived from undue emphasis upon the words 'meaningful association' as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the records of the case under current consideration."

Similarly, the government's brief in *Niukkanen* in this Court observed:

> "And all lower court rulings since *Rowoldt* have considered the total evidence in determining whether there was *substantial basis for a finding* of consciousness by the alien that he was joining an organization known as the Communist Party which operates as a distinct and active political organization." (Br. in No. 130, Oct. Term, 1959, p. 22.) (emphasis supplied)

The court below, however, did not apply this test. If it had, since the evidence showed even less than was present in *Rowoldt*, the court would necessarily have found that the government had failed to carry its burden of showing a "meaningful association."

5. After forty years of residence in the United States, where he has lived since he was ten years old, petitioner is being uprooted from his family, his home and his job, and is being exiled from the society of which he is a part. These consequences have been decreed for nothing more than conduct which was innocuous, non-criminal, and constitutionally protected—attendance at some Communist Party meetings and payment of dues. We submit that this case, which is by no means atypical, calls for a clarification of the

standard of proof to be applied in cases involving the expulsion of lawfully admitted aliens for post-entry causes.

Expulsion of an alien from the society to which he was admitted and by which he has been assimilated is comparable in its nature and consequences to the denaturalization of a citizen. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284; *Jordan* v. *DeGeorge*, 341 U.S. 223, 231; *Galvan* v. *Press*, 347 U.S. 522, 530; *Trop* v. *Dulles*, 356 U.S. 86, 98. Indeed, one of the harshest features of denationalization is that it may subject the individual concerned to deportation. See *Trop* v. *Dulles*, *supra* at 102. Because of the harsh consequences, this Court has established the requirement in expatriation and denaturalization cases that the government must prove its case by "'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt.'" *Perez* v. *Brownell*, 356 U.S. 44, 47; *Schneiderman* v. *United States*, 320 U.S. 118, 158. A like concern for human rights requires the adoption of a similar rule in deportation cases. Such a rule would not permit the deportation of petitioner on the flimsy evidence in this record.

6. *Galvan* v. *Press*, 347 U.S. 522, sustained the validity of legislation expelling resident aliens for past, meaningful membership in the Communist Party. In *Rowoldt*, the Court later accepted for review, but did not reach, the constitutionality of the statute.

We submit that the Court should determine whether the Constitution permits the statute to provide for deportation on a record which shows nothing more than past nominal membership. Moreover, *Galvan* itself should be re-examined. It upheld the Communist de-

portation statute "only on historical grounds." *Kimm v. Rosenberg*, 363 U.S. 405, 415. Recent research demonstrates, however, that *Galvan* lacks solid support in either history or principle. See Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 Yale L. J. 1578, 69 Yale L. J. 262 (2 articles), particularly 69 Yale L. J. at 287-89.

CONCLUSION

Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

DAVID REIN
JOSEPH FORER
711 14th St. N. W.
Washington, D. C.

Attorneys for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,429

JOSE MARIA GASTELUM-QUINONES, *Appellant*

v.

WILLIAM P. ROGERS, Attorney General of the United States, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided December 8, 1960

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. Gilbert Zimmerman, Special Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before EDGERTON,* DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge*: This is an appeal from a judgment of the District Court dismissing appellant's [plaintiff's] complaint for review of an order of deportation issued by the Board of Immigration Appeals [Board]. The order complained of was issued pursuant to authority delegated to the Board by the Attorney General under § 241(a)(6), of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(6), which reads in pertinent part:

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> * * * *

* Judge Edgerton took no part in the consideration or decision of this case.

"(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * *

"(C) Aliens who are members of . . . the Communist Party of the United States . . . ."

Appellant, a Mexican national, first entered the United States in 1920 and has resided here since that time. On February 28, 1957, a special inquiry officer of the United States Department of Justice, Immigration and Naturalization Service, after hearing on a rule to show cause issued March 23, 1956, found that, after his aforementioned entry into the United States, appellant was a voluntary member of at least two units of the Communist Party of the United States in Los Angeles, California. At the hearing, although voluntarily placed under oath, appellant, upon advice of counsel, invoked the Fifth Amendment and refused to testify. Appellant was accordingly ordered deported.

On November 14, 1957, the Board, to which appellant had appealed, ordered the appeal dismissed on the basis of the testimony before the special inquiry officer and his findings. The Board, in the appellate proceeding, stated that appellant was represented by able counsel, who was given the widest latitude in conducting his defense. Reviewing the testimony, the Board said:

"Counsel contends the record does not establish that respondent's membership was voluntary. The testimony introduced by the Government reveals that the respondent's membership continued over a period from late 1948 or early 1949 to at least the end of 1950; that for several months, an attempt was made to make the respondent a leading figure in a unit of the Communist Party; that the respondent paid dues over the period of his membership; and attended many meetings closed to all but members of the Communist Party. This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He

did not assert that the membership was involuntary. We believe this record establishes that respondent's membership was voluntary."

We think the record amply supports this finding.

About one month later, on December 9, 1957, the Supreme Court rendered its decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (1957). On the basis of that decision and at appellant's request, the Board reopened the case so that, in the Board's words, "[appellant] will be permitted to present such evidence as may be appropriate [to place his case within the framework of Rowoldt]."

All that occurred at the reopened hearing before the special inquiry officer was that appellant's counsel made a statement to the effect that the evidence of record did not establish the "meaningful association" adverted to in *Rowoldt*, that a *prima facie* case did not exist and, therefore, that it was unnecessary to offer any further evidence. Accordingly, appellant again did not take the stand nor offer any evidence.

After the second and abortive hearing, the special inquiry officer filed his second opinion, calling attention to the fact that appellant had refused to testify during the original hearing, on a claim of privilege, and added:

> "Although the respondent's motion requested reopening of the proceedings to offer testimony which he alleged would place him within the framework of *Rowoldt*, and despite the fact that the Board of Immigration Appeals granted the reopening for said purpose, the respondent failed to testify, to offer any documentary evidence, or to present any witnesses at the reopened hearing."

Calling attention to the fact that, despite the reopened hearing, the sum total of the evidence of record was exactly the same as it was when the decision of February 28, 1957, was entered and that the only new development

was the Supreme Court's *Rowoldt* decision, the special inquiry officer proceeded to compare *Rowoldt* with the instant case, holding them to be clearly distinguishable, quoting from the decision of the Board in ordering reopening of the case as follows:

> "In the instant case, however, the situation is quite different. Neither by testimony at the hearing nor as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political party. When the respondent registered as an alien in 1940, he stated that he had not belonged to any clubs, organizations or societies (Exhibit 3). When questioned in 1953 prior to hearing, concerning membership in the Communist Party, he refused to answer. During the five hearings which were held from April 13, 1956 to July 9, 1956, he never admitted having been a member of the Communist Party but sat by silently while his counsel attacked the testimony of the witnesses who stated that *he had been a member of the Communist Party.* Quite different then is the situation in the instant case from that in *Rowoldt* where unchallenged testimony accepted by the authorities presented a record at the most so balanced that it permitted the inference that Rowoldt's affiliation with the Communist Party may well have been wholly devoid of any political implications. This type of a balanced record is not presented in the instant case. Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a political party and long association with it. Moreover, Rowoldt joined at a time when it meant to him getting something to eat, something to wear and a place to 'crawl into.' This element tended to place the case in a state of balance for it made questionable

the validity of drawing the inference which normally follows from the joining and association with a political party. The respondent's membership on the other hand was at a time when economic conditions did not require the individual to join in mass effort to obtain the simple necessities of life. (See *Schleich* v. *Butterfield*, 252 F.2d 191, C.A. 6, February 14, 1958)"

The special inquiry officer, therefore, reaffirmed his original findings of fact and conclusions of law and, there being no request for discretionary relief, again ordered deportation. The appeal taken from that order was dismissed by the Board on May 18, 1959, the Board concluding its opinion as follows:

"Both sides are content to rest upon the record. The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning. The appeal will be dismissed."

Thereupon, appellant filed in the District Court his complaint for review of the deportation order, and for declaratory judgment and injunctive relief. On cross motions for summary judgment, the Board's motion for summary judgment was granted, that of appellant was denied, and the complaint was dismissed. This appeal followed.

Appellant's principal contention is that *Rowoldt* established a concept of "meaningful association" which requires the Government to show something more than mere membership in the Communist Party before a deportation order can validly be issued. In considering this contention, involving as it does the meaning of a recent Supreme Court decision, a brief study of the development of the present law will be helpful.

It is well settled that an alien who is in the United States must be afforded procedural due process before he may be constitutionally deported. *Ng Fung Ho* v. *White* 259 U.S. 276 (1921), *Fong Haw Tan* v. *Phelan*, 333 U.S. 6 (1947). Under the Alien Registration Act of 1940, 54 Stat. 670, the pertinent ground for deportation was advocacy of the overthrow of the United States Government by force and violence. This ground was upheld as consistent with due process in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1951). Under the Act of 1940 it was necessary in each deportation case involving membership in the Communist Party to prove that the individual advocated overthrow of the government by force and violence. The position of the Communist Party itself was immaterial.

The Internal Security Act of 1950, 64 Stat. 987, 1006, 1008, dispensed with the need for proving, in each individual case, that the alien involved advocated overthrow of the government by force and violence, and made Communist Party membership the test. The Supreme Court upheld this lessened burden of proof as constitutional in *Galvan* v. *Press*, 347 U.S. 522 (1954). In *Galvan* the Court placed great emphasis on a detailed legislative finding, contained in § 2(1) of the Act that:

> "[The] Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship . . ." At page 529.

The section here involved was then in effect in its present form. The Court held that the word "member" as used in 8 U.S.C. § 1251(a)(6)(C), the section involved here, was not limited to those "members" of the Communist Party who are fully cognizant of and who endorse the Party's advocacy of violence.

"It must be concluded . . . *that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization*, and that he did so of his own free will." [Emphasis supplied.] Galvan v. Press, *supra*, at page 528.

In *Galvan* the Supreme Court also mentioned that, "Petitioner does not claim that he joined the Party 'accidentally, artificially, or unconsciously in appearance only . . .," thus lending inferential support to the Government's view that the burden is on the alien to show that his Party membership was something other than bare organizational membership.

Under the 1940 Act, membership in the Communist Party was not a ground for deportation, but actual personal advocacy of the overthrow of the government by force and violence was. Under the present Act as interpreted by *Galvan* actual personal advocacy of the overthrow of the government by force and violence is not a prerequisite to deportation; it is enough for the Government to show membership in the Communist Party.

It seems to us that the detailed legislative finding contained in § 2(1) of the 1950 Act and quoted *supra* makes the latter ground consistent with due process. The legislative finding merely states that the Communist Party as a political organization is devoted to the overthrow of the Government of the United States by force and violence, the ground upheld by *Harisiades* v. *Shaughnessy*, *supra*. The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof

of membership in the Communist Party, (2) the legislative finding of the nature of the Party, and (3) the presumption that a member of a political organization espouses the tenets of the organization.

In *Rowoldt* the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the "meaningful association" required by the statute. We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan*. Rather, we think that *Rowoldt* amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.

Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party membership was meaningful is established by the record, and since appellant here failed to offer any evidence whatsoever, the presumption must stand.

We add that the Board "did not draw any inference from the fact of appellant's silence that his testimony would have been adverse to him if given." Nor have we drawn an inference. Whether such an inference may be drawn we need not, under the circumstances of this case, determine. The judgment of the District Court is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960.

Civil 1421-59

No. 15,429

JOSE MARIA GASTELUM-QUINONES, *Appellant*

v.

WILLIAM P. ROGERS, Attorney General of the United States, *Appellee*

Appeal from the United States District Court for the District of Columbia

Before: Edgerton, Danaher and Bastian, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment ——— of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per CIRCUIT JUDGE BASTIAN

Dated: December 8, 1960.

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FILED
MAR 9 1961
JAMES R. BROWNING, Clerk

No. 711

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,
Department of Justice, Washington 25, D. C.

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584228—61

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 711

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 54–61; Pet. App. 1a–8a) has not yet been reported. The memorandum of the district court is not reported (R. 50–52).

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1960 (R. 62; Pet. App. 9a). A petition for rehearing was denied on January 9, 1961 (R. 70, 71). The petition for a writ of certiorari was filed on February 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to show that the petitioner was deportable as an alien who had become a member of the Communist Party within the meaning of Section 241 of the Immigration and Nationality Act of 1952.

STATUTE INVOLVED

Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251) provides in pertinent part:

> (a) General Classes.
>
> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *.
>
> * * * * * *

STATEMENT

The petitioner, a native and national of Mexico, seeks review of the judgment of the court of appeals affirming a judgment of the District Court for the District of Columbia which denied him relief from an order directing his deportation on the ground that he is an alien who, after entry into the United States, had become a member of the Communist Party within the meaning of Section 241(a)(6)(C) of the Immigration and Nationality Act.

1. THE PROCEEDINGS AND FINDINGS

On February 28, 1957, after a hearing at which the petitioner refused to testify, a special inquiry officer of the Immigration and Naturalization Service found, on the basis of testimony by government witnesses, that the petitioner had entered the United States in 1920 and that subsequent thereto he had been a voluntary member of at least two units of the Communist Party. The officer ordered that the petitioner be deported (R. 6–28).

On November 14, 1957, an appeal from the order of deportation was dismissed by the Board of Immigration Appeals (R. 29–33) on the ground that the government's testimony had established a prima facie case of voluntary membership in the Party during the years 1948 or 1949 to 1950 (R. 30).

On January 13, 1958, after this Court's decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (decided December 9, 1957), the petitioner moved the Board for reconsideration of the order of deportation in the light of the decision or for reopening of proceedings to enable him to offer testimony. The Board, although concluding that on the existing record *Rowoldt* did not govern the case, ordered the hearing reopened to permit the petitioner to present evidence (R. 34–37).

At a reopened hearing before the special inquiry officer on December 16, 1958, the petitioner did not testify or present evidence, but offered merely a statement by counsel that the existing record did not

establish "meaningful membership" in the Party within the meaning of *Rowoldt* v. *Perfetto*. The inquiry officer, faced with the record previously considered, reaffirmed his original decision that the petitioner, after entry into this country, had been shown to be a voluntary member of the Communist Party by reasonable, substantial and probative evidence (R. 38–42).

The Board of Immigration Appeals dismissed an appeal, finding again that the record, upon which both sides were content to rest, established meaningful membership (R. 43–44).

On May 22, 1959, the petitioner filed in the district court a complaint for declaratory and injunctive relief against the order of deportation. The complaint alleged that the finding of Communist Party membership was not based upon the required reasonable, substantial and probative evidence but upon unwarranted inferences, and that the statute under which deportation was ordered was unconstitutional as applied (R. 1–3). On September 21, 1959, the court granted the government's motion for summary judgment, holding that the case was governed by this Court's decision in *Galvan* v. *Press*, 347 U.S. 522, and that the hearing officer had a right to act upon the testimony offered by the government (R. 50–52).

The court of appeals affirmed, holding that the finding of meaningful membership was established by the record. It noted that the government had made a prima facie case by proving voluntary membership, and the burden was on the petitioner to come

forward with an explanation. It did not find it necessary to determine whether an inference could be drawn from the petitioner's silence (R. 61; Pet. App. 8a).

2. THE TESTIMONY

At the hearing before the special inquiry officer, two witnesses, former members of the Communist Party during the years 1947 through 1951 and 1952, testified to having known the petitioner as a Party member (R. 45, 81, 94).

One, Daniel Scarletto, met the petitioner in early 1949 and saw him thereafter at two meetings of the El Sereno Club, a unit of the Party consisting of 32 members (R. 81–82, 78). Attendance at the meetings was restricted to Party members (R. 79–82) and the petitioner was a member of this unit (R. 82). When, on Party orders in 1949, the El Sereno unit was broken into smaller units for security reasons (R. 79) both the petitioner and Scarletto were transferred to the Mexican Concentration Club (R. 82–83). The petitioner was a regular member of this unit and his membership continued to the latter part of 1950 (R. 83). Scarletto saw the petitioner at the closed meetings of the unit (R. 86–87) and collected Party dues from him (R. 84). Scarletto also saw the petitioner at a Communist Party convention. Attendance was restricted solely to Party members; each person seeking admission was required to appear before a screening panel, state his club and position, and be identified by members of the panel before being permitted to enter (R. 86).

The other witness, Fabian Elorriaga, met the petitioner at a meeting of the 45th Concentration Club of the Party (R. 93). The petitioner was a member of this club (R. 93, 97). The witness thereafter saw the petitioner at the regular meetings of the club over a period of three years (R. 94). The meetings were closed to all but Party members (R. 94). Elorriaga also recalled an executive meeting at which the petitioner was present. The meeting was either for organizational purposes or to form an agenda. Executive meetings were restricted to Party members and probably to officials of the unit (R. 94–95). At a later point in the hearing, Elorriaga testified that he recalled two closed meetings of the Concentration Club (in 1949 and 1951) at which the petitioner was in attendance [1] (R. 46, 98).

ARGUMENT

1. The sole issue here is whether the petitioner is subject to deportation as an alien who, after entry,

[1] The Board of Immigration Appeals observed that this testimony of Elorriaga was inconsistent with his earlier account that the petitioner was seen in regular attendance at meetings over a period of three years. It did not find it necessary however to resolve the conflict "since we regard Elorriaga's testimony as corroborative and it establishes that the respondent was a member of the Communist Party". (R. 32–33).

The special inquiry officer characterized Elorriaga as a "very tense, nervous, and overcautious" witness who gave the impression of qualifying statements of simple facts within his knowledge in an exaggerated effort to achieve accuracy in his testimony. The officer said (R. 23): "[n]otwithstanding the foregoing, I am satisfied that Elorriaga was sincere and honest in testifying."

has been a member of the Communist Party under *Galvan* v. *Press*, 347 U.S. 522, or whether he is saved from deportation under *Rowoldt* v. *Perfetto*, 355 U.S. 115. The issue is not, as the petitioner suggests, a legal one. It is a factual issue turning upon the evaluation of testimony upon which the order of deportation is based. See *Niukkanen* v. *McAlexander*, 362 U.S. 390, 391.

In *Galvan*, this Court stated that the test of membership under the statute was met when "the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will." 347 U.S. 528–529. The Court found this test met by the alien's admissions (later repudiated) that he had joined the Party, attended meetings, and refrained from applying for citizenship for fear of exposing membership, and by testimony of a witness that the alien had been an officer in an alleged Party unit.

In *Rowoldt*, this Court distinguished *Galvan* on its facts (355 U.S. at 120, 121), finding that the evidence of the alien's membership emanating from the alien himself did not show "meaningful" membership where at the same time the alien made repeated uncontradicted statements that his admitted membership in the Party during 1935 was motivated solely by the "fight for something to eat and clothes and shelter" (*id.* at 119):

There is nothing in the present case to bring it within the holding of *Rowoldt*. Here, as in *Galvan*, there was evidence from independent sources which, if believed, would establish that the petitioner was an active, dues-paying, voluntary member of the Communist Party. Unlike *Rowoldt*, there is nothing in the record which could suggest that the alleged association was motivated by considerations other than political. The petitioner never suggested otherwise, although the hearing was reopened at his request to permit him to bring himself within the framework of *Rowoldt*.

In the light of these considerations, the court below properly upheld the administrative finding that the petitioner's membership in the Communist Party was "meaningful". The decision below represents no departure from established principles; it is consistent with decisions since *Rowoldt*. See *Niukkanen* v. *McAlexander, supra*; *Schleich* v. *Butterfield*, 252 F. 2d 191 (C.A. 6), certiorari denied, 356 U.S. 971. See also *Rystad* v. *Boyd*, 246 F. 2d 246 (C.A. 9), certiorari denied, following *Rowoldt*, 355 U.S. 912.

2. There is no occasion for the Court to reconsider constitutional issues settled by *Galvan* v. *Press*. The Court was requested to do so in *Niukkanen* v. *McAlexander*, 362 U.S. 390, but, although sustaining the deportation found it unnecessary to reconsider the constitutional issue in its opinion.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

MARCH 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 711

[illegible] MARIA GASTELUM QUIÑONES, Petitioner,

v.

WILLIAM P. ROGERS, Attorney General,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONER

DAVID B[illegible]
JOSEPH [illegible]
711 [illegible]
Washington, D. C.
Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 711

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

WILLIAM P. ROGERS, Attorney General

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY FOR PETITIONER

---

1. The government is wrong in asserting that the issue involved in this case is not "a legal one," but merely "a factual issue turning upon the evaluation of testimony" (Opp. 7).

As we understand *Rowoldt* v. *Perfetto*, 355 U. S. 115, in a Communist deportation case (1) the Immigration and Naturalization Service has the burden of proving that the alien's Party membership was a "meaningful

association," and (2) this burden is not satisfied merely by showing, without more, that the alien had attended some Party meetings and paid dues. Whether or not *Rowoldt* means this is clearly a legal issue. This issue is important practically, as well as theoretically, because of the large number of aliens who are, and the many more who may be, involved in deportation cases of this kind.

This legal issue is posed squarely and starkly in this case because (1) the Court of Appeals and the Board of Immigration Appeals flatly held that once organizational membership was shown, a "meaningful association" would be presumed or inferred unless rebutted by the alien, and (2) the court below and the Board held petitioner deportable solely on findings of attendance at meetings and payment of dues. These rulings are, as shown in our petition, both novel and dubious.

The presence of a legal issue in this case was explicitly recognized by the Board of Immigration Appeals which stated that the case involved an "evaluation of Rowoldt" (R. 37). The legal issue is even laid bare in the government's Statement, which says (Opp. 4-5): "The court of appeals affirmed. . . . It noted that the government had made a prima facie case by proving voluntary membership, and the burden was on the petitioner to come forward with an explanation."

In its argument the government fails to recognize the legal issue involved in this case only because it disregards the findings, the holdings and the language of the court below and the Board. We may be sure, however, that if the decision below is allowed to stand, the government's perception will be sharpened, and it

will thereafter rely on the decision as an important legal precedent for sustaining deportation cases which would otherwise be too flimsy to survive in the light of *Rowoldt*.

2. We must protest the government's version of the facts. The government says (Opp. 8), "Here, as in *Galvan*, there was evidence from independent sources which, if believed, would establish that the petitioner was an *active*, dues-paying, voluntary member of the Communist Party" (emphasis supplied). The Board of Immigration Appeals expressly held (R. 35) that petitioner's membership in the Communist Party "was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the respondent and had attended closed meetings of the Communist Party with him and the general corroboration offered by the testimony of government witness Elorriaga." If the word "active" in the government's statement means anything other than attendance at meetings, it does not jibe with the administrative findings. If "active" means only attendance at meetings, it tends to conceal the fact that the evidence does not satisfy the standard of *Rowoldt*, in which case the alien was a dues-paying voluntary member who had attended meetings.

The government's summary of the testimony (Opp. 5-6) on its face indicates no "activity" by petitioner beyond payment of dues and attendance at meetings. Even so the summary goes beyond the evidence which the fact-finding agency was willing to consider. The government refers (Opp. 6) to testimony of Elorriaga (R. 94) that he saw petitioner at three or four Club meetings a month over a three-year period, including

an executive meeting. It relegates to a footnote the fact that the Board of Immigration Appeals refused to find these particulars because they were inconsistent with the witness' later testimony that he saw petitioner at only two or three meetings of the Club (R. 32-33).

Again, the government states, "Scarletto also saw the petitioner at a Communist Party convention" (Opp. 5). The government neglects to point out that neither the Board nor the court below found any significance in this fact or placed any reliance on it. The reason why this matter was inconsequential appears from Scarletto's testimony on the subject (R. 86):

> "I saw him [petitioner] at one convention one time.
>
> "Q. Do you recall when that was?
> "A. It was when I was in the El Sereno Club, we had a convention one time, at Echo Park, at the Echo Park Women's Club, a big hall, they had, and I saw Joe Gastelum there.
>
> "Q. Do you know whether he was there on [sic] an official capacity?
> "A. No."

Respectfully submitted,

DAVID REIN
JOSEPH FORER
711 Fourteenth St., N. W.
Washington, D. C.
Attorneys for Petitioner

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 711

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

DAVID REIN
JOSEPH FORER
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 711

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR REHEARING

---

1. If the denial of certiorari in this case stands, the immediate result will be that petitioner will be deported from the country where he has lived for forty-one years, since the age of ten, to a land to which he is now a stranger, leaving behind his wife, his American-born children and grandchildren, his friends, and the base for his livelihood. These harsh consequences will be incurred as a result of an order based on a record

which shows, at most, an inactive, nominal membership for a short period in the Communist Party. The legal theory by which the expulsion was justified, in the face of *Rowoldt* v. *Perfetto*, 355 U. S. 115, was the novel and doubtful doctrine that meaningful Party membership would be presumed merely from a showing of organizational membership, and that the burden was on the alien to rebut this presumption. So the court below stated (R. 61) that the deportation statute draws a rebuttable "presumption of support" of the Communist Party "from the bare fact of membership;" that "the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership;" "and since [petitioner] here failed to offer any evidence whatsoever, the presumption must stand."

If the decision below is permitted to stand, the purposeless cruelty of the expulsion in this case will be repeated in many more cases in which there will also be applied the rule that the burden of proof is on the alien. Yet as a practical matter, the aliens involved will not have the opportunity to reach this Court for review of that rule. This is because there is no provision for an automatic stay of deportation pending judicial review. Such stays are obtained, frequently with great difficulty, only on application to, and by special order of, the reviewing courts. In view of the decision in this case and the denial of certiorari, the courts in other cases will, in all likelihood, regard the rule as to burden of proof settled, and will not stay deportation to permit its testing. Even if stays are granted in some cases, they will undoubtedly be denied in others, so that the aliens in the latter cases will be deported before they can apply

for certiorari or even before they can perfect an initial appeal.

Yet the rule placing the burden of proof on the alien has never been approved by this Court nor has it been applied by any decision other than the present one. Even the government did not defend the validity of this rule in its opposition to the petition for certiorari. Instead, it argued, contrary to the facts, that the case involved only an assessment of the evidence to determine if the *Rowoldt* standard was met. This circumstance, however, is buried in the archives of the Court. It will not prevent the Immigration Service from considering that it has now received complete judicial approval of its doctrine that a "normal inference" of meaningful association derives from joining the Communist Party (see R. 37, 41-42); it will not cause the Court of Appeals for the District of Columbia Circuit to re-examine its presumption doctrine; and it will not convince other courts that the burden of proof question is still open.

Certainly a rule of this importance both legally and practically, and a rule which will in the future have wide application in immigration cases, should not receive this Court's approval in this *sub silentio* fashion. Whether the rule is correct or not, it requires consideration by this Court so that litigants in the future may be guided as to the nature of the rule and so that the rule may not be followed as having been sanctioned by this Court, without the Court's express approval.

2. It may be that the denial of certiorari in this case was influenced by the view that no great burden is placed on an alien by requiring him to tell his story

if he wants to get the benefit of the ameliorating doctrine of *Rowoldt*. Any such view is superficial and unrealistic.

In the first place, it is a highly dangerous precedent to make an inroad on the previously firm principle that the government has the burden of proving that the alien is squarely within a deportable class. Attrition of this principle in cases in which the deportable class consists of non-nominal members of the Communist Party will inevitably spread to other situations.

Secondly, there are a substantial number of aliens against whom administrative deportation proceedings have been completed on grounds of past Communist membership, who did not choose to testify because they believed that the Service had not carried the burden of proving that the alleged membership was more than nominal. These aliens will not have a chance to satisfy the new rule that the burden of proof is on them. They will be deported, even though in fact they were no more than nominal members, simply because they could not anticipate the novel rule shifting the burden of proof.

Thirdly, it is frequently a difficult and dangerous thing for an alien to testify about his connections with the Communist Party even if in fact he never was a member or if he was only a nominal member.

In the typical political deportation case, the accusation relates to a highly remote period, going back ten, twenty and even thirty years. The Service's witnesses are embittered ex-Communists, anxious to expiate their past, or professional witnesses. Frequently they are aliens or naturalized citizens who fear that unless they propitiate the Immigration Service they themselves

may incur deportation or denaturalization proceedings on account of their past Party membership. Accusations of Communism are, as cases in this Court have shown, frequently untrustworthy and perjurious. Often, unreliable witnesses magnify into Party "membership" contacts which non-Communists had with Communists in a different political climate than the present.

The alien, therefore, particularly if he has had some left-wing associations in the past, has ample reason to fear that his truthful denial of membership, or his truthful explanation that membership was nominal, may involve him in a perjury prosecution based on the testimony of untruthful witnesses. Furthermore, the chances are that his testimony will do him no good in the deportation proceeding. The Service's Special Inquiry Officers have a predisposition to credit the "impartial" accusing witnesses over the "interested" alien. Where the witness is a professional, his repeated utilization by the government virtually forecloses examining officers from discrediting him.

This very case illustrates the point. Two witnesses testified that petitioner had been a member of the Communist Party. Elorriaga's testimony was so self-contradictory that the Board of Immigration Appeals was unable to make specific findings thereon, but yet treated it as "corroborative" of Scarletto's testimony (R. 33). Elorriaga also had lied about his Party membership when he applied for and obtained employment in a defense plant (Tr. 108-110, 154). Although the FBI had knowledge of his employment in defense industry and questioned him about his Communist Party membership, Elorriaga retained his defense employment (Tr. 134-37).

The other witness, Scarletto, is a professional anti-Communist witness. Appearing as a government witness in the Communist Party case before the Subversive Activities Control Board, he gave lurid testimony which turned out to be entirely at variance with his report to the FBI and with an account he had given of the alleged incident only a few weeks before when testifying as a government witness in a Smith Act case.* Eventually, even the Subversive Activities Control Board refused to credit his testimony (see our Petition for Certiorari, p. 3, ftn. 1). In the deportation case against petitioner, the Board of Immigration Appeals found that Scarletto falsified his state of health in applying for an insurance policy with the IWO in order, as he said, to carry out his instructions from the FBI, and also "was not frank in regard to his marital history" (R. 31-32). Yet the Board fully credited his testimony against petitioner (R. 30).

Respectfully submitted,

DAVID REIN
JOSEPH FORER
Attorneys for Petitioner

CERTIFICATE

I certify that this petition for rehearing is presented in good faith and not for delay and that it is restricted to substantial grounds available to petitioner although not previously presented.

DAVID REIN

---

* See Brief for Petitioner, pp. 206-07, in No. 48, Oct. Term 1955, *Communist Party* v. *Subversive Activities Control Board*.